86-1153

Supreme Court, U.S.
FILED
JAN 7 1987
JOSEPH F. SPANIOL, JR.
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No.

IN THE

Supreme Court of the United States

October Term, 1986

FBK REALTY CORP.,

Petitioner,

against

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

STEVEN R. LAPIDUS
ABRAMS LERNER KISSELOFF
KISSIN & LAPIDUS, P.C.
1350 Avenue of the Americas
New York, NY 10019
(212) 581-8600
Counsel of Record and Counsel for Petitioner

Of Counsel:
STANFORD M. SINGER
ABRAMS LERNER KISSELOFF
KISSIN & LAPIDUS, P.C.
1350 Avenue of the Americas
New York, NY 10019
(212) 581-8600

January 7, 1987

Question Presented

Is a state zoning provision facially unconstitutional as constituting a taking of property without compensation or a deprivation of property without due process of law where it precludes issuance of any Alteration Permit for a given property upon finding of past "harassment" of residential tenants by the owner of the property (1) where an Alteration Permit is a prerequisite for any substantial repair or improvement of the property; (2) where "owner" is defined as *anyone* in the prior chain of title, in whose acts the present owner may not have participated and of which he may have neither actual nor constructive knowledge; and (3) where the prohibition against issuance of an Alteration Permit runs with the property *forever*, rendering it unsaleable?

List of Parties

The parties to the proceedings below were the petitioner FBK Realty Corp., a corporation of the State of New York, and Anthony Gliedman, former Commissioner of the Department of Housing Preservation and Development of the City of New York. The present respondent is Mr. Gliedman's successor as Commissioner, Paul A. Crotty.

Petitioner FBK Realty Corp. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

FBK REALTY CORP.

Petitioner,

v.

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

The petitioner FBK Realty Corp. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Department, entered in this proceeding, originally captioned *FBK Realty Corp., Petitioner v. Anthony Gliedman, Commissioner, etc., Respondent,* on December 3, 1985.

Opinions Below

The opinion and decision of the Department of Housing Preservation and Development of the City of New York is reprinted in the appendix hereto, p. 1a, *infra.* That opinion was confirmed, without opinion, on direct review pursuant to Section 7801, *et seq.* of the New York Civil Practice Law and Rules ("C.P.L.R.") by the New York Supreme Court, Appellate Division, First Department ("Appellate Division"), whose judgment is reprinted in the appendix hereto, p. 66a, *infra.*

The within petitioner appealed directly, as of right, to the Court of Appeals of the State of New York, which dismissed the appeal. Successive motions for leave to appeal to the Court of Appeals were denied, respectively,

by the Appellate Division and the Court of Appeals itself. Such dismissal and denials are reprinted in the appendix hereto, pp. 70a, 82a, and 92a, *infra*, respectively.

Jurisdiction

Jurisdiction of this Court to review the judgment of the Appellate Division is invoked under 28 U.S.C. Section 1257(3), which provides for *certiorari* to review state statutes as repugnant to the Constitution of the United States.

Statute Involved

Section 96-109 of the Zoning Resolution of the City of New York:

> Prior to the issuance of an alteration permit by the Department of Buildings for an alteration other than an incidental alteration for a *building* containing *residential uses* within the Preservation Area, the Administrator of Housing and Development shall certify to the Department of Buildings:
>
> (a) That prior to evicting or otherwise terminating the occupancy of any tenant preparatory to alteration, the owner shall have notified the Administrator of Housing and Development of his intention to alter the *building*;
>
> (b) That the eviction and relocation practices followed by the owner of the *building* satisfy all applicable legal requirements and that no harassment has occurred.

(Italics in original as denoting terms defined elsewhere in Zoning Resolution.)

Statement of the Case

Petitioner FBK Realty Corp., a New York corporation ("FBK"), contracted, on or about August 30, 1983, to purchase the land and building known as and located at 468 West 47th Street, New York, New York (the "Premises"). The seller of the Premises was Nirco Investors Corp. FBK had and has no business or other connection whatsoever with Nirco or with any prior owner of the Premises, except that of purchaser to seller. A title search showed that the Premises had been free of complaints or findings of harassment of residential tenants of the Premises.

In view of the location of the Premises in the "Special Clinton District" on the west side of Manhattan, as defined in Section 96-00, *et seq.* of the Zoning Resolution of the City of New York, an area of Manhattan previously known as "Hell's Kitchen," FBK applied to the Department of Housing Preservation & Development of the City of New York ("HPD"), of which the respondent Paul A. Crotty is the Commissioner, pursuant to Section 96-109 of the Zoning Resolution, for a Certificate of No Harassment, a mandatory prerequisite for issuance of an Alteration Permit by the New York City Department of Buildings.

The Record in this matter shows that HPD interprets Section 96-109 such that an owner of property located in the Special Clinton District must prove that no "harassment" of residential tenants has taken place at the property at any time, by himself or by anyone else. HPD's position is that it makes no difference that the owner himself had nothing to do with any acts of alleged "harassment," or that he is unconnected with any prior alleged acts of "harassment" of any prior owner, or that he has no real or even constructive notice of such prior acts, if any. Indeed, an owner's stated and unequivocal intention to improve the property for the benefit of present and prospective

residential tenants, and his efforts and expenditures in that regard, are deemed equally irrelevant.

Under Section 96-109, if "harassment" has taken place at the property, at any time, by anyone, regardless of the lack of connection to the present owner, a Certificate of No Harassmant must be refused. Without such certificate the owner can never receive an Alteration Permit with respect to his property. He must own the property with no legal ability to improve it, or even to upgrade essential systems for the benefit of the residential tenants. This situation persists, as a matter of law, forever. Since Section 96-109 thus requires that, in perpetuity, no improvement can be made, the property has, as a practical matter, no resale value.

In May, 1984, notwithstanding the fact that FBK had never evicted or relocated tenants, and notwithstanding FBK's guarantee that tenants have the unqualified right to remain as rent-controlled tenants under local law for as long as they wished, HPD issued a determination of "reasonable cause" to believe that "harassment" had occurred at the Premises. A hearing was scheduled, therefore, to resolve the listed allegations of harassment as set forth in a "Notice of Hearing" dated July 5, 1984.

On July 18, 1984, a hearing was held before the office of Administrative Trials and Hearings of the City of New York, Joel I. Sosinsky, HPD's Administrative Law Judge, presiding. HPD produced only one witness concerning acts of alleged harassment, a tenant whose testimony showed that certain prior owners of the Premises had failed or had been unable to provide certain services and that, basically, over the last 15 years, the Premises had deteriorated along with the entire surrounding neighborhood.

HPD's witness described how the Premises had allegedly been permitted to deteriorate during the period beginning

in 1976, when the Premises was substantially damaged by a fire. At that time the firefighters broke into the witness' apartment, removed her window, chopped up her door and removed the skylight from the hallway. Those conditions were repaired in some four to six weeks. The roof was repaired later. The alleged failures to provide building services or maintenance referred to the period between 1976 and 1983, prior to the purchase of the Premises by the Petitioner.

Nirco Investors Corp. purchased the Building in July 1983. Shortly after Nirco took title, new doors and locks were installed on apartments, as were a series of locks for the front door of the Building which, unfortunately, proved unresistant to intruders, due to the fact that the Premises are across the street from a park inhabited by drug addicts. New windows were installed and the basement cleaned.

In October 1983 the Premises were purchased from Nirco by FBK. HPD's witness contrasted favorably the conditions in the Premises subsequent to FBK's ownership with those preceding, by testifying that the new owners (1) put a new lock on the vestibule making it necessary to have a key to gain access to the Building; (2) began replastering her apartment (3) provided a new refrigerator, toilet and completely new bathroom; (4) patched the roof; and (5) had replaced hallway lightbulbs with working fluorescent lights. The tenant denied that any of FBK's principals had made any statements or done any acts to encourage her to vacate her apartment.

Ted Reed, Jr., an architectural consultant who testified on FBK's behalf, testified that the Premises, located in a physically run-down area, surrounded by buildings requiring alteration and updating, was built around the turn of the century and that the present antiquated DC electrical system had to be replaced, along with the plumbing, which was described as being beyond repair.

Mr. Reed identified FBK's building plans and testified that the plans proposed new partitions, plumbing, heating and electrical systems and new double-pane windows. Such renovation was intended to work "around" the two occupied apartments, so that the present tenants would not have to vacate.

Mr. Reed described the repair of the heating system as resulting in a monumental "Catch 22." One of the "harassment" allegations against FBK was the failure to provide adequate heat and hot water. Correction of this problem necessarily involved replacement of the boiler. Such replacement required an Alteration Permit, however, which could not issue because of the intervening allegations of "harassment." Faced with such a circular, insoluble dilemma, FBK went ahead and did what was necessary, by installing a boiler without permit. The Premises was thereupon cited with a Building Code violation for illegal installation of the new boiler, *i.e.*, without an Alteration Permit!

Mr. Reed testified that, if no permit could be issued with respect to re-vamping the electrical and plumbing systems, and the Premises continued to deteriorate and increase in dangerousness, the same "Catch 22" would necessarily apply to any efforts to renovate such systems.

Mr. James Hefelfinger, FBK's President, testified that, immediately upon closing title to the Premises, FBK had changed the front door lock cylinder and gave new keys to the tenants and a new electrical hot water system was installed. With respect to the apartment occupied by HPD's sole witness, various emergency repairs were done quickly, including replacement of an old watercloset with a modern toilet, upgrading of the electrical circuitry, installation of a new refrigerator and the installation of new apartment door locks and "saddle," along with repairs to the roof of the apartment, and repainting and replastering of the apartment. All of these acts were obviously inconsistent with an intention on the owners' part to harass the tenant into vacating the apartment.

It was and is FBK's intention to rehabilitate the Building and renovate vacant apartments and common areas. Mr. Hefelfinger explained that this would take some time in view of the administrative roadblock contained in Zoning Resolution Section 96-109.

What made the roadblock particularly egregious was that neither FBK nor any of its principals had ever committed or attempted any acts which would indicate to anyone that they wanted the present tenants of the building to vacate. On behalf of FBK, Mr. Hefelfinger guaranteed the tenants the right to remain as rent-controlled tenants as long as they wished, and he did so on the record at the hearing.

Mr. Hefelfinger observed that the immediate area consisted of housing stock predating the turn of the century and a large population of vagrants and drug addicts. Neither the owners' principals nor employees had seen any intruders inside the Building, or, indeed, anyone other than HPD's tenant witness. When the owners had been told of derelict problems, they have called the police and have urged the tenants to do the same. Following some on-site inspections, FBK had tinned up windows in vacant units adjacent to fire escapes, and resecured units showing evidence of break-ins, and had done everything in their power to keep squatters out of the Building.

The HPD hearing officer promised counsel to render a decision not later than September 14, 1984. When no decision had been rendered as of that date, FBK's counsel telephoned Mr. Sosinsky to inquire as to when a decision could be expected. At that time counsel was informed that, two weeks before, the proposed decision was submitted to Yasmin Duncan, Esq., the attorney who had prosecuted the case on behalf of HPD, and that, *under instruction from the Deputy Commissioner of HPD, Mr. Sosinsky was directed to submit his decision to HPD Deputy Commissioner Felstein for her review before its issuance.* Counsel's complaint, noting that any semblance of impartiality by

the respondent in this process had thus been entirely vitiated, went unanswered by the respondent.

Adopting proposed findings of fact and conclusions of law submitted by Ms. Duncan, Mr. Sosinsky determined that FBK's acts and intentions were irrelevant and that any act which might be construed as "harassment" of tenants by any prior owner would justify the effect of Zoning Resolution Section 96-109, *i.e.*, precluding the issuance of any Alteration Permit with respect to the Premises forever. (p. 3a, *et seq.*)

Mr. Sosinsky inferred from the fact that many tenants vacated their apartments during the ten years of prior ownership, and with no other evidence, that such proved the owner's intent to empty the building of residential tenants.

Despite the evidence that police were ineffective in such matters, and despite testimony that front door locks were continually being broken and replaced, and despite the evidence showing that FBK had obtained the removal of some of the squatters, and solely on the basis of FBK's inability to secure the main entrance on a continuous basis and to keep the building entirely free from squatters and other breakers-in, Mr. Sosinsky inferred that FBK was "deliberately" attempting to force the remaining tenants to vacate. (*Id.*)

Mr. Sosinsky also made reference in his determination to alleged instances of lack of provision of heat and insufficient cold water and lack of garbage collection at unspecified times since the time FBK had owned the Premises, without noting that these allegations were not even mentioned in the testimony by the sole tenant called to testify. Mr. Sosinsky claimed as dispositive the alleged fact, also not set forth in the testimony, that it would be in FBK's pecuniary interest to have the remaining tenants vacate their apartments.

Mr. Sosinsky concluded that HPD had proved by preponderance of the evidence that:

> a) The eviction and relocation practices of the owner did not satisfy all applicable legal requirements; and
>
> b) that harassment of tenants had occurred in the past and continues to occur at the subject premises.

Based on Mr. Sosinsky's findings, on October 12, 1984, the respondent denied FBK's application for a Certificate of No Harassment.

FBK thereupon initiated a proceeding under C.P.L.R. Article 78 in the nature of *certiorari* and *mandamus* to annul the HPD determination. Before Special Term of New York State Supreme Court, New York County, FBK argued, *inter alia,* that, Zoning Resolution Section 96-109 is unconstitutional for the following reasons: (1) the statute precludes the issuance of any Alteration Permit as to any building in the Special Clinton District where there is found "harassment" or "unlawful eviction and relocation practices," by any owner at any time in the past, which terms are undefined, regardless of the fact the present owner or applicant may have had no connection with, or real or even constructive notice of, such "harassment," or "unlawful eviction and relocation practices" (2) the statute effectively precludes any development or sale of such property forever, and thus effects a taking of property without compensation or a deprivation of property without due process of law, in violation of the Constitution of the State of New York and the Fifth and Fourteenth Amendments to the Constitution of the United States. Petitioner demanded that judgment be entered by Special Term in favor of FBK and against the respondent, declaring that Section 96-109 of the Zoning Resolution of the City of New York is unconstitutional on its face.

Special Term transferred the matter to the Appellate Division, First Department, of the New York State Supreme Court without reaching the merits. The Appellate Division confirmed the respondent's determination without opinion (p. 66a). An appeal to the New York State Court of Appeals, taken on the constitutional issue was dismissed without costs, *sua sponte* (p. 70a). A motion for leave to appeal was denied by the Appellate Division (p. 82a), and a renewed motion was denied by the Court of Appeals itself (p. 92a).

REASON FOR GRANTING THE WRIT

Zoning Resolution Section 96-109 is Unconstitutional on its Face as Effecting a Taking of Property Without Compensation or a Deprivation of Property Without Due Process of Law.

For purposes of this Petition we will assume, for purposes of argument, the factual correctness of HPD's finding that FBK had "harassed" tenants and committed unlawful eviction and relocation practices, though the record shows the contrary and though the administrative procedure which led to that finding is constitutionally tainted as well.*

---

* In the New York courts FBK argued that the expression "kangaroo court" was not altogether inapplicable to the administrative proceedings in issue. We recognize this Court's pronouncement in *Withrow v. Larkin*, 421 U.S. 35, 47-48 (1975) that there is a presumption of non-bias and no *per se* denial of procedural due process in combining prosecutorial and judicial functions in one agency. Nonetheless that presumption may be rebutted, *Schweiker v. McClure*, 456 U.S. 188, 195-196 (1982).

The record in this matter shows, essentially, that the Hearing Officer submitted his determination to the HPD prosecutor for approval before issuing it. There can be no greater showing of actual bias. *See Hastings v. Judicial Conference of United States*, 770 F.2d 1093, 1100 (D.C. Cir. 1985). At the very least, the procedure vitiated the appearance of fairness. *Utica Packing Co. v. Block*, 781 F.2d 71, 77 (6th Cir. 1986). *See also* Stewart, J., dissenting, in *Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482, 497 (1976).

A. Threshold issues

1. Standing to Challenge Vicarious Liability For Acts of Prior Owners (The Finding That Petitioner Had Itself "Harassed" Tenants)

There are two threshold issues in this Petition. The first is one of standing, in anticipation of the Respondent's argument challenging FBK's standing to raise the issue of vicarious liability.

In the various applications for review by the New York Court of Appeals, and presumably in this Court as well, the respondent will argue that the "harassment" finding against FBK vitiates review by this Court of Section 96-109, insofar as we are concerned with an owner's vicarious liability for acts of unrelated predecessors in title. Respondent will argue that, since the Petitioner itself "harassed" tenants (whatever *that* means), then that issue is irrelevant and the Petitioner lacks standing to raise it.

On the contrary, if, under a statute, a present property owner must suffer a perpetual inability to improve his property, based on alleged acts of predecessors in title in whose acts he did not participate, and of whose acts he has neither real nor constructive knowledge at the time he has acquired the property, the statute is facially unconstitutional. If the statute is facially unconstitutional, then it is void *ab initio* and creates neither rights nor disabilities in the first instance, and is to be treated as if it never existed. *Merton v. Abbott Laboratories,* 595 F.Supp. 834 (D.N.H. 1984); *Gary v. Spires,* 473 F.Supp. 878 (D.S.C. 1979).

These circumstances are analogizable to the rule permitting federal *habeas corpus,* despite an intervening guilty plea. Citing this Court's opinion in *Blackledge v. Perry,* 417 U.S. 21, 30 (1974), as explained in *Menna v. New York,* 423 U.S. 61, 62 (1975), the U.S. Court of Appeals for the Ninth Circuit held, in *Journigan v. Duffy,* 552 F.2d 283 (9 Cir. 1977):

> Even if the guilty plea establishes as a factual matter that [the petitioner] did the acts charged, a successful constitutional attack on the statute violated by those acts would undermine the foundation of the criminal prosecution, making those acts noncriminal. The statute, if unconstitutional, would be void and the conviction a nullity *ab initio*. As the Court explained in *Ex parte Siebold*, 110 U.S. 371, 376-77 [1879]:
>
> [The constitutionality of the statute] affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.

For purposes of this case, if Section 96-109 is void as providing for vicarious liability for acts of prior owners, then it is as if Section 96-109 was never enacted: Petitioner would be entitled to an Alteration Permit on the same basis as any other applicant, even assuming that the FBK committed acts of "harassment," since such would not have required a Certificate of No Harassment in the first instance.

In any event, the issues having to do with the prohibition against improvements in perpetuity are not affected by an assumption, *ad arguendo*, of the within FBK's personal culpability for "harassment."

2. Facial Unconstitutionality *versus* Unconstitutional Application

In the New York State courts we argued, in the alternative, that Section 96-109 was unconstitutional as applied by HPD. Since, in the text of the statute, the word "owner" does not necessarily refer to any and all prior owners for "harassment" purposes, we argued that HPD's administrative interpretation of the statute, as necessarily making such reference, was unconstitutional.

Given the present procedural posture of the matter, however, and particularly in the absence of any other extrinsic aids to interpretation, we must assume the validity of HPD's interpretation, and that the legislative body which enacted the provision intended it to apply to acts of unrelated prior owners. HPD is, after all, the agency charged with administration of the statute. *Blum v. Bacon,* 457 U.S. 132 (1982); *FEC v. Democratic Senatorial Campaign Committee,* 454 U.S. 27 (1981). HPD having duly interpreted Section 96-109 such that "owner" refers to any and all owners in the chain of title, we are put in the position of arguing that the statute is facially unconstitutional.

B. No Reasonable Relationship to Valid Governmental Purpose

When a zoning statute is challenged, on non-procedural grounds, as violative of the Due Process clause, the question is whether there is a reasonable connection between it and promotion of health, comfort, safety and the welfare of society. *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

At paragraph 91 of its Answer in state court (p. 61a), the respondent has asserted:

> Section 96-109 of the Zoning Resolution, pursuant to which Respondent denied Petitioner's application for a certification of no harassment, thereby barring substantial alteration of the subject premises, constitutes a reasonable and valid exercise of the power of the City, for the general health and welfare, to control the use and development of property, and did not effect a taking of Petitioner's property without due process of law. It is beyond question that a municipality may impose restrictions on the use and development

> of property for promotion of the general health and welfare of its populace.

On the contrary, we submit that making an owner responsible for alleged acts of predecessors in title will not further the ostensible aims of the legislation. Taken to its logical conclusion, Section 96-109 is irrational, arbitrary and that it not reasonably related and applied to some actual or manifest evil.

As noted below, the permanent nature of the prohibition imposed by Section 96-109 is unconstitutional in the first instance. That the prohibition applies even where the present owner/applicant has committed no acts which resemble harassment, renders it unconstitutional *a fortiori*. How can Section 96-109 be said to have any "rational basis," if its draconian effects are laid upon those who had nothing to do with what the section is supposed to prevent? We submit that no such "rational basis" exists.

In *Matter of Belle Harbor Realty Corp. v. Kern*, 35 N.Y.2d 507, 364 N.Y.S.2d 698, 323 N.E.2d 697 (1974), the New York Court of appeals established a three-pronged test of determining the "necessity," in constitutional terms, of land use regulation, which is in accord with this Court's holdings in *Ambler Realty* and its progeny:

> To justify an interference with the beneficial enjoyment of property the municipality must establish that it has acted in response to a dire necessity, *that its action is reasonably calculated to alleviate or prevent the crisis condition*, and that it is presently taking steps to rectify the problem.

35 N.Y.2d at 512 (emphasis added). Since Section 96-109 is applicable to all applicants, regardless of whether or not they ever carried out or condoned the prohibited activities, the rational connection between the law, and the evil it ostensibly combats, is nonexistent: the alleged wrongdoer

has already sold the property and made his profit. The net result will necessarily be abandonment of the property.

Since renovation is contingent on the issuance of an Alteration Permit, Section 96-109 is itself what prevents such renovation, and what compels the tenants to live under the "harassing" conditions described at the hearing. Such is both unreasonable and unconstitutional.

C. Conclusive Presumptions

In the state courts Respondent answered the above argument by observing that, unless the section applies no matter who committed the alleged harassment, prior owners who have committed such acts can easily escape the consequences by simply conveying to nominal purchasers.

Such is pure sophistry. The Respondent's rationale is nothing more than a conclusive presumption of nominal conveyance, and an owner's connection to prior owners and collusion in their alleged acts. It is equivalent to similar conclusive presumptions in which Respondent indulged, *i.e.*, that failure or inability to provide any single service or to provide for quiet enjoyment in any minor particular, establishes an intent to cause tenants to vacate, or that such can be conclusively inferred from it being in petitioner's pecuniary interest to vacate the building (on which no facts were adduced below).

The Constitution permits no irrebuttable presumptions where, as here, such are not necessarily true in fact and where the government has reasonable alternative means of making the crucial determination. *Hurley v. Van Lare*, 380 F.Supp. 167 (S.D.N.Y. 1974), vacated on other grounds 421 U.S. 338 (1975). Irrebuttable presumptions are offensive to the Due Process clause because they effectively deny an individual the right to challenge the purported factual basis of a determination adversely affecting his life and property.

D. Indefinite Prohibition

The most egregious facet of Section 96-109 is the indefinite effect of a finding of past "harassment." The prohibition against issuance of an Alteration Permit runs with the land, precluding substantial improvement or renovation *forever.*

To be sure, certain statutory moratoria on certain types of uses or improvements have been upheld. For example, in *Schafer v. City of New Orleans,* 743 F.2d 1086 (5 Cir. 1984), an ordinance precluding fast-food restaurants for a period not more than eleven months was upheld, with the following *caveat:*

> [The statute] merely suspends the owners' ability to devote their property to a particular use for 10 1/2 months. *We express no opinion on the reasonableness of zoning the property more restrictively than is presently permitted.* The City has taken no such action.

(Emphasis added.) In *Smoke Rise, Inc. v. Washington Suburban San. Comm'n.,* 400 F.Supp. 1369 (D.Md. 1975) a five-year moratorium on sewer hook-ups was upheld as not violative of Due Process, as preventing excess discharge while there was no ability to conduct a proper treatment. The court observed:

> [W]hile local governments may properly impose a moratorium on development for police power purposes, *such a moratorium must be reasonably limited as to time.*

400 F.Supp. at 1385-1386 (emphasis added).*

* Ironically, the court in *Smoke Rise* contrasted the factual situation in that case with that set forth in *Belle Harbor Realty Corp. v. Kerr,* 43 A.D.2d 727, 728, 350 N.Y.S.2d 698, 701 (1973), where a similar moratorium had been voided as violative of Due Process since it was essentially indefinite.

A similar observation was made in *Steel Hill Development, Inc. v. Town of Sanbornton,* 469 F.2d 956 (1st Cir. 1972), where an interim zoning measure, restricting lot size to a six acre minimum, was upheld as an "interim stop-gap measure:"

> *Were we to adjudicate this as a restriction for all time,* and were the evidence of pressure from land-deprived and land-seeking outsiders more real, *we might well come to a different conclusion.*

469 F.2d at 962 (emphasis added). The First Circuit later had an opportunity to deal with the other side of the coin in *Urbanizadora Versalles, Inc. v. Rivera Rios,* 701 F.2d 993 (1st Cir. 1983), where a "freezing" of a property owner's land for 14 years by reserving the land for future public improvements or condemnation (by placing a proposed highway on the site on the official land map), but without actually condemning the land, was held to be an unconstitutional deprivation of property.

In particular, the First Circuit noted in *Rivera Rios* that, because of the administrative location of the highway on the official map, the property had been "rendered useless for development or sale." 701 F.2d at 996. The same is true here. Because of the finding of "harassment," FBK can neither develop nor sell the subject property, since the disability to develop runs with the land forever.

In the state courts, the respondent sought to minimize the drastic effect of Section 96-109 by noting that not *all* improvements are precluded. The grossly deteriorated condition of the subject property (and of most of the property in the so-called "Clinton District") and the documented and uncontradicted episode involving the necessarily illegal installation of the new boiler (p. 6, *supra*) shows that such minimization is disingenuous.

We submit that the disability goes beyond simple deprivation. Whether one views "taking" as going to the degree to which one's use of property is restricted, *Pennsylvania Coal Co. v. McMahon,* 260 U.S. 393 (1922), or as attempting to secure a public benefit (as opposed to preventing a public harm) *Smoke Rise, Inc. v. Washington Suburban Sanitation Commission, supra,* we submit that the effect of Section 96-109 is nothing less than a taking of property without compensation.

Despite the Respondent's efforts, in the courts below,. to minimize its draconian effects, the simple fact is that, based on a finding of "harassment," an owner is precluded from improving property, even to the extent of curing the conditions which gave rise to the alleged "harassment" in the first instance. Since the property is thus rendered unsaleable and unimprovable, the result cannot be other than abandonment and acquisition of the property by the City. Thus a genuine "taking" without compensation is inevitable. Under the Fifth and Fourteenth Amendments to the Constitution, this result cannot be countenanced.

CONCLUSION

For the above-stated reasons, this petition for *certiorari* should be granted. For some arcane reason, the municipality has determined that the so-called Clinton District retain its "character," *i.e.*, it shall remain a foul and decaying slum in perpetuity, with property owners prohibited *by law* from curing the very conditions which the statute is *supposed* to remedy.

It is essential that this Court provide guidelines by determining the question, not adequately answered by the District Courts and the Circuit Courts of Appeals, as to the magnitude of the nature and duration of the disability to improve property which may constitute a taking of property without compensation or a deprivation of property without due process of law.

The zoning provision in question is an unwarrantable interference with property rights in a substantially large area of the nation's largest city. This Court should duly declare Section 96-109 unconstitutional and remand the matter to the state courts.

Respectfully submitted,

STEVEN R. LAPIDUS
ABRAMS LERNER KISSELOFF
KISSIN & LAPIDUS, P.C.
1350 Avenue of the Americas
New York, New York 10019
(212) 581-8600

Counsel of Record and
Counsel for Petitioner

Of Counsel
STANFORD M. SINGER
ABRAMS LERNER KISSELOFF
KISSIN & LAPIDUS, P.C.

January 7, 1987